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Intent in the Criminal Law: The Legal Tower of Babel

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COMMENT

INTENT IN THE CRIMINAL LAW: THE LEGAL TOWER OF BABEL

"Concrete cases or illustrations stated in the early law . . . have had a tendency to ossify into specific rules without much regard for reason."[1]

These words by the learned Justice Holmes concerning the rule of "retreat to the wall" are essentially applicable to innumerable other areas of the law, both civil and criminal. Under our system, the law has a definite tendency to become stagnant because of the principle of *stare decisis* and because of the inclination of both courts and lawyers to fit new concepts and theories into accepted legal molds and phraseology. Such a procedure inevitably means the growth of the content of a word while the word itself remains the same, so that a legal word of art arises, intelligible, if at all, only in reference to a mass of case law and juristic explication. Such a situation, like the ossification of a legal concept, is most detrimental to the growth of the law in accord with reason. Courts and lawyers begin to think in terms of the word of art rather than the basic principles which gave birth to the necessity for the use of the word at all.

This paper is concerned with a legal word of art, "intent," as it is used and understood in criminal law. It proposes to set forth the concept of intent as utilized in the positive law of crimes and the confusion which surrounds this concept, along with a short historical summary of the development of the criminal law and the idea of intent as it plays a part in that development. Secondly, this article proposes to delineate part of the relationship between moral-religious law and the criminal law as they interpret the basic elements of individual responsibility, and, also, to set forth the writer's opinion as to what the legal foundation for criminal liability should be. Finally, this paper will touch lightly on certain types of statutory crimes which in the light of the principles to be discussed seem to the writer to be a clear perversion of the criminal law.

The Concept and Growth of Criminal Intent

Speaking generally, there are three types of legal intent. Specific intent is a requirement of some crimes, usually those derived from the common law, and it is said that specific intent calls for actual knowledge of the law and the wrongful intent to do the prohibited act.[2] In reference to a crime, this would seem to mean that specific intent is the wilful commission of an act known to be forbidden by the criminal law. General intent, on the other hand, is commonly deemed to be that type of intent which may be drawn from the commission of the act itself. For

[1] Holmes, J., in Brown v. United States, 256 U.S. 335, 343 (1921).
[2] Hargrove v. United States, 67 F. 2d 820 (5th Cir. 1933).

example, in a case of involuntary manslaughter, the requisite general intent may be inferred from the negligence of the accused.[3]

The third type of intent pertinent to criminal law is constructive or transferred intent. The doctrine has received little judicial support,[4] probably because of the broad scope given to general intent, and we are not presently concerned with it.

The above statements in regard to intent, general and specific, seem relatively clear and cohesive. Yet, in reference to the growth of criminal law and the case law which interprets the concept of intent, the notions of intent become clouded and vague. Perhaps some concrete examples will serve to illustrate just how amorphous is the concept of intent.

Generally, assault is deemed to require a specific intent, the intent to do violence. This is fairly obvious since assault is really an unlawful attempt, and criminal attempt is universally held to require a specific intent. Yet even a cursory glance at the case law will show that while courts may demand specific intent in an assault case, they will frequently settle for general intent, i.e., the intent will be inferred from the act itself.[5] Another view in assault cases is that specific intent cannot be inferred from the fact of assault alone, but that it can be drawn from the whole circumstances of the case.[6] Yet every act has surrounding circumstances, so that even here specific intent is essentially being drawn from the act itself. Some courts have drawn the specific intent from an unlawful act with foreseeable consequences.[7] All this occurs in the face of the judicial thought that the guilty intent must be proved, that it cannot be inferred.[8]

Thus, although the concepts of specific and general intent and their distinctions seem well defined and of some substance, the case law shows how closely the two concepts blend with one another. In essence, the net result is that the two concepts merge so that all the particular meaning of specific intent is destroyed. Both are drawn from the act itself, or from the surrounding circumstances which is practically the same thing. The only difference seems to be the order of proof. It is generally conceived that the state has the burden of proving

[3] Rex v. Bateman, 19 Cr. App. R. 8 (1925). Just how much negligence is required is a matter of disagreement. *Compare* Rex v. Bateman, *supra,* with Fitzgerald v. State, 112 Ala. 34, 20 So. 966 (1895). Here, again, is an interesting bit of legal jargon. The requisite negligence has been judicially described as gross, criminal, wanton, or reckless. Yet, whichever word is chosen makes little substantial difference except in jury instructions.

[4] State v. Martin, 342 Mo. 1089, 119 S.W. 2d 298 (1938).

[5] State v. Lankford, 6 Boyce 594, 102 Atl. 63 (1917); People v. Lee Kong, 95 Cal. 666, 30 Pac. 800 (1892).

[6] Acers v. United States, 164 U.S. 388 (1896).

[7] State v. Schutte, 87 N.J.L. 15, 93 Atl. 112 (1915).

[8] Rex v. Steane, 1 All E.R. 813 (1947). The courts have even gone so far as to say that specific intent can be drawn from a conditional threat. People v. Connors et al., 253 Ill. 266, 97 N.E. 643 (1912). *Contra,* Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392 (1877).

specific intent in the first instance, while in the case of general intent the state need only show the act from which the intent will be presumed. As we have seen, in the present state of the law, this rule means little in actual practice.

We are, then, in an area where the courts say one thing but frequently mean another. Such a process inevitably leads to judicial confusion. It is suggested that *Commonwealth v. Hawkins*[9] presents such a situation. The case concerned a charge of assault with a deadly weapon. As has been pointed out, such a charge would normally demand a specific intent. However, the court stated in part:

> "It is the general rule in criminal proceedings at common law that a defendant cannot be convicted unless a criminal intent is shown, but it is not necessary that he should have intended the particular wrong which resulted from his act.[10]

Thus, the court calls for general rather than specific intent, and it then goes on to justify such action by reference to a situation of transferred intent.

> "It is a familiar rule that one who shoots intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B. So, in cases of homicide, the rule is well established, that one who wantonly, or in a reckless or grossly negligent manner, does that which results in the death of a human being, is guilty of manslaughter, although he did not contemplate such a result. . . . There has been much discussion in the cases in regard to the nature of intent necessary to constitute this crime, but the better opinion is that nothing more is required than an intentional doing of an act which, by reason of its wanton or grossly negligent character, exposes another to personal injury, and causes such injury.[11]"

This is not meant to intimate that this decision as to final result was erroneous, and, after all, it is the result of litigation with which judicial administration is primarily concerned. If judicial confusion and linguistic inaccuracies were all that were involved, and if the ultimate determination of the particular case were always acceptable, there could be no valid criticism. However, legal fictions and linguistic inaccuracies have a grave tendency to end in unreasoning injustice. They mold the legal mind to think in terms of fictions and words of art without regard to elemental concepts and basic principles of justice. It is such a result as this which has occurred through the utilization of the word intent, as that word has come to be used in criminal law.

It may be well at this point to sketch rather briefly the development of criminal law in reference to the growth of the legal concept of intent to demonstrate fully what the writer believes is a clearly unreasonable and unjust result as a consequence of legal confusion over the real meaning of intent. While it

[9] 157 Mass. 551, 32 N.E. 862 (1893).
[10] Commonwealth v. Hawkins, 157 Mass. 551, 553, 32 N.E. 862, 863 (1893).
[11] *Id.* at 553, 32 N.E. at 863.

has been said that "it is useless to go into the developments of the law from the time when a man who had killed another no matter how innocently had to get his pardon,"[12] it is also true that an idea of the growth of the law is helpful in comprehending a rule of law and in evaluating a trend in the law.

It appears in primitive times that criminal or penal law was wholly objective. Both moral culpability and individualization in regard to the accused were lacking. There was no concept that a guilty mind was an element of the transgression of the social law, and punishment followed regardless of moral guilt.[13] The act itself was the primary object of censure. However, by the time that the common law had developed in England, great advances in legal theory had been made. It was conceived that an act and an evil intent must combine in order to constitute a crime.[14] Thus, it has been thought that at common law knowledge and an evil intent were requisites of all crimes.[15] So it appears at common law that evil intent was deemed to be an essential element in criminal liability, and it was in the common law that the doctrine of specific intent had its real inception.

As society developed and civilization became more complex, the courts and legislatures began to back away from the concept of specific intent and the philosophy that lay behind it. As a consequence of this procedure, the ideas of specific and general intent became merged so that specific intent lost almost all of its distinctive characteristics. This has been mentioned in reference to the crime of assault as it is understood in its modern legal setting.

The development was natural. It is obvious that a person's intent can never be objectively demonstrated; at best, a person's subjective intent can only be drawn from an objective act. Since this is true, the courts finally faced the obvious either by demanding only general intent, i.e., intent as drawn from the act itself, or blended the concepts of general and specific intent so as to make the latter largely meaningless. Actually, it seems to make little difference which word or group of words is chosen so long as they correctly reflect that quality of a person which is a proper basis for criminal liability, and so long as the words and the proper basis for criminal liability are accurately understood by courts, lawyers, and legislatures.

At the same time, however, there was a far more invidious trend in legal thought. The concept of individual punishment as a result of a guilty mind which had taken so long to develop began to lose ground. Society became molded and systematized, and its governing law also inclined to crystallize into fixed patterns and rules. The important aspect of criminal liability was no longer a guilty

[12] Holmes, J., in Brown v. United States, 256 U.S. 335, 343 (1921).
[13] See SALEILLES, *The Individualization of Punishment*, MODERN CRIMINAL SCIENCE SERIES 21-34 (1911).
[14] 1 BISHOP, THE CRIMINAL LAW 113, 263 (8th ed. 1892).
[15] State v. Dombroski, 145 Minn. 278, 176 N.W. 985 (1920).

mind; rather, the important aspect of a crime became the very commission of an act forbidden by the positive law of a particular jurisdiction. The act and its consequences became the focal point. The idea of intent was retained generally as a necessary element in a crime,[16] as a vestigial remnant of the older legal theory, but since general intent may be drawn from the act itself it is fairly correct to say that the act itself and its consequences are of primary import in present criminal law.

This new emphasis in criminal law has given rise to a wholly new type of crime, the statutory crime. Such a result was preordained by the confusion surrounding the idea of intent and the development of the sociological and pragmatic view of law. By a statutory crime, I refer to that type of act declared to be criminal without reference to intent. By judicial interpretation, this has come to mean criminal liability without reference to whether the act is known to be definitely wrong and frequently without reference to whether the person even knows that he is doing the act. No intent, even as understood by the law, is required; the act itself is the thing to be punished. There are numerous illustrations of such laws, e.g., the sale of securities without a license,[17] or the automobile rifling statutes.[18] The latter normally makes mere possession of an automobile whose engine numbers have been rifled a criminal offense. With the law in this posture, a person may be liable for the act of another without even knowledge that the act has been done.[19]

Nor is the principle behind the statutory crime, i.e., the act itself is to be punished regardless of intent, limited to statutory crimes *per se*. The basic principle has been extended so as to include a field of vicarious criminal liability. Thus it has been said that a corporation may be guilty of larceny, a crime requiring specific intent, since the requisite criminal intent may be imputed to it through the acts of its agents.[20]

To recapitulate for a moment, we see a natural and seemingly logical growth and refinement of criminal law. At first, the act itself is punished regardless of intent. Then intent becomes the primary element of criminal liability, the *mens rea* is considered the factor which makes a person deserving of criminal punishment. Subsequently, the courts and legislatures begin to chop away at the idea of specific intent and to place greater emphasis upon the act and its consequences as the foundation upon which to lay criminal responsibility. Finally, we

[16] See, for example, Proctor v. State, 15 Okla. Crim. Rep. 338, 176 Pac. 771 (1918).
[17] People v. Flumerfelt, 35 Cal. App. 2d 495, 96 P. 2d 190 (1939).
[18] People v. Fernow, 286 Ill. 627, 122 N.E. 155 (1919).
[19] Statutory crimes are not limited to individuals. The idea has been extended to corporations. In United States v. Parfait Powder Puff Co., Inc., 163 F. 2d 10008 (7th Cir. 1947), a corporation was held liable for the unauthorized act of an agent of which it had no knowledge.
[20] People v. Canadian Fur Trappers' Corp., 248 N.Y. 159, 161 N.E. 455 (1928).

reach the ultimate sociological-pragmatic position where the courts and legislatures follow this development to its logical conclusion by placing total emphasis upon the act and its consequences regardless of intent.

This, then, is the growth of criminal law and theory, a growth on which commentators frequently dote as demonstrating the flexibility of the common law system. The present writer, however, regards this development as a growth of the law without regard to reason or common sense, as a retrogression of the law rather than an advancement. While it represents a development which is quite logical, this is logic carried to the point of absurdity and ultimate injustice. To speak of intent on the part of a corporation is to invade the wonderland of Alice;[21] to punish men as criminals without regard to mental action is unjust and shocking. This is, indeed, growth of the law, but it is a law growing in an unintelligible and unreasonable manner.

When law becomes unreasonable and incomprehensible, and results in unjust consequences, it is time to re-evaluate the rules and premises on which the law is founded. It becomes essential to return to fundamental and elemental principles on the nature of man and society, and the interrelationships between the two, in order to achieve a comprehensive, harmonious, just, and effective system of criminal law.

Common Sense Concerning Criminal Law

It is the writer's belief that criminal law can learn a great deal from moral law. We are a Christian, ethical people, with our religious and moral roots sunk deeply in the Christian philosophy of man and society. The common law, particularly that of crimes, developed in this philosophy and theology, and it can be broadly said that our present system of criminal law is but a judicial and legislative refinement of common law principles. It would seem quite natural, then, that there should be a great many similarities between moral law and positive criminal law, at least in their basic elements.

However, for a good many years, there has been a definite judicial inclination to completely divorce moral law and positive criminal law. Thus, one writer, in speaking of federal criminal law where the common law has not been adopted, has felt that the basis for criminal responsibility is the consequence of the act upon the public, and that moral fault is not a necessary element of a crime except as it may be involved in the very fact of violation of the law.[22] Judicial statements are frequently to the same general effect. It has been said that the criminal law

[21] "'But "glory" doesn't mean "a nice knock-down argument,"' 'Alice objected. "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" So also with the "intent" of a corporation. "Intent" as used by this court apparently means, "the agents of the corporation did this and the corporation ought to pay."

[22] See MAY, LAW OF CRIMES 16 (4th ed., Sears & Weihofen 1938). This analysis disregards the construction of statutory law in the light of common law precepts and ideas.

aims at preventing certain acts and results not at punishing sins,[23] and that criminal law frequently does not punish acts which are morally wrong.[24]

It cannot be successfully denied that moral law and criminal law have different objectives in part, nor that there is a grave distinction between a crime and a moral wrong. To say that moral law and criminal law are not synonymous is quite correct; to follow the same line of reasoning in order to put the moral law and the criminal law in conflict as to the ultimate basis for responsibility is quite another thing. There is a distinction in the type of act prohibited by moral and criminal law, and a difference in the result to be attained, but there should be no conflict as to the foundation of liability. This is apparent from a consideration of the two types of law.

Moral law is founded on the principle that every thing should and must act in accord with its own peculiar nature. Man, a creature of intellect and free will, must freely act in a rational or reasonable manner. Moral law is, in our society, buttressed by certain religious precepts which set forth certain acts contrary to man's nature, e.g., murder, adultery, theft, etc. The moral-religious order presents the ideal basis for a system of law. It presupposes an omnipotent and omniscient God, and an individual conscience which informs man of right and wrong in each particular factual situation. Under this system, with its prerequisites of God and conscience, a man commits a moral wrong only when he knowingly and wilfully does an act which he knows to be wrong or should know to be wrong except for culpable ignorance. Under the moral law, we are almost entirely preoccupied with the mental state of the actor. It really matters not what the act itself was or what its consequences were, for moral law is concerned with intellectual fault and not objective result. The requisites of moral wrong are a certain knowledge, a free will, and the commission of an act known to be wrong, with total emphasis on knowledge and will rather than on the act itself.

Positive criminal law, on the other hand, is, and should be, first concerned with the act and secondarily with the mind of the actor. This is necessarily so, since the jury in the positive legal system stands in the relationship of God to the moral system, and the only way for the jury to reach the subjective mental state of a person is through an inference drawn from an objective act. This is not to say that positive criminal law is wholly, or even primarily, concerned with the act itself. It is, or should be, concerned with the act as it shows a reprehensible mental state on the part of the actor. Barring statutory crimes, this can generally be said to be the law, since a crime as defined normally includes an act plus some kind of intent.

[23] Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897).
[24] People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907).

The essential elements of a crime, therefore, appear to be some kind of intent and an illegal act. Intent, however, in essence means a certain knowledge and will on the part of the actor. This is apparent from several considerations.[25] In the first place, criminal law is generally applied only to human beings, excepting of course later application to business entities through a wholly fictitious use of the word intent. That is to say, usually criminal law is applied only to creatures with the knowledge and will. The primitive concept of punishment of animals as responsible for their acts is abhorrent and even amusing to the modern mind.

Secondly, that the real basis of criminal liability is a certain knowledge and will is shown by the theories on criminal punishment. Criminal punishment consists primarily of either public disgrace or personal harm. It involves either a fine, which is in no way distinguishable from tort damages except in measure and in the idea of public censure, or it involves incarceration or death. The purpose of criminal punishment has been variously urged as punitive, preventive, reformative, or for public vindication. The modern trend seems to favor the preventive or reformative purposes, in the utilitarian view of criminal punishment. One writer in stressing this view has gone so far as to state that punishing a person for involuntary or unintentional acts is stupid, since he cannot possibly be improved by punishment in such a case.[26] Here, again, in the field of criminal punishment, we find an emphasis on the voluntary and intentional (knowing and wilful) quality of an act.

Finally, and most conclusively, that the basis of criminal responsibility is a certain knowledge and will is demonstrated by the various defenses open in most criminal prosecutions. Facts which show either lack of knowledge or lack of will normally constitute defenses to the charge of crime. For example, while it is said that ignorance of the law is no defense,[27] ignorance of the facts from which a wrongful intent can be drawn may be a defense.[28] So, also, where specific intent is required, severe drunkenness may be a defense.[29] The defense of insanity also stresses lack of knowledge as an answer to a crime, at least as far as that defense

[25] Perhaps the greatest legal analyst to sit on the Supreme Court bench has recognized knowledge as the basic element of legal responsibility. He wrote, "as a last step, foresight was reduced to its lowest term, and it was concluded that, subject to exceptions which were explained, the general basis of criminal liability was knowledge, at the time of action, of facts from which common experience showed that certain harmful results were likely to follow." HOLMES, THE COMMON LAW 130, 131 (1881).

[26] See WOOD, *Responsibility and Punishment*, 28 J. CRIM. L. 630-640 (1938).

[27] It should be remembered that the doctrine that ignorance of the law is no defense is subject to some exceptions. In administrative cases, mistake of law may be a defense, i.e., where an agency interpretation of the law is relied upon. People v. Ferguson, 134 Cal. App. 41, 24 P. 2d 965 (1933). In reality, this seems to make knowledge of the law and intent to obey it a valid defense. Perhaps this should be the rule in all cases.

[28] United States v. Ah Chong, 15 Philippine 488 (1910); Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575 (1875).

[29] State v. Byers, 136 Wash. 620, 241 Pac. 9 (1925).

is set out in the M'Naghten test of right and wrong.[30] The right and wrong test, clothed in modern garb, is still almost universally accepted. As for lack of will as a defense, the obvious answer is duress,[31] which essentially means a lack of will to commit the act. Another defense based on lack of will is insanity by reason of irresistible impulse, acceptable in several jurisdictions throughout the United States.[32]

An outstanding exposition of the latter defense which also emphasizes knowledge and will as the basis of criminal responsibility is contained in *Parsons v. State*.[33] Whether or not one agrees with the psychiatric premise behind the defense of irresistible impulse, the theory of the court in regard to the problem of criminal responsibility presents a rational and even ideal approach. The court said in part:

> *"No one can deny that there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) Capacity of intellectual discrimination; and (2) Freedom of will . . .* (Emphasis added).
>
> If therefore, it be true, as a matter of fact, that the disease of insanity can, in its action on the human brain through a shattered nervous organization, or in any other mode, so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim *to choose* between the right and wrong although he perceive it—by which we mean the power of volition to adhere in action to the right and abstain from the wrong—is such a one criminally responsible for an act done under the influence of such controlling disease: We clearly think not, and such, we believe to be the just, reasonable, and humane rule, towards which all the modern authorities in this country, legislation in England, and the laws of other civilized countries of the world, are gradually, but surely tending . . .[34]"

Whatever may be the trend as to irresistible impulse, we can only wish that the same rational approach and common sense trend were present in all areas of criminal law as to the foundation for criminal liability. However, the prevalence of statutory crimes shows that the current inclination is clearly away from knowledge and will as forming such a basis.

Nonetheless, if it be correct that knowledge and will are the *proper* foundation on which to lay criminal responsibility, then there is no conflict between moral and criminal law. To sum up what has been said, the basis of moral responsibility is knowledge, will, and a *known wrongful act;* the basis of criminal responsibility is intent and an illegal act. But intent, as shown by theory and

[30] M'Naghten's Case, 10 Clark & Fin. 200 (1843).

[31] See Nall v. Commonwealth, 208 Ky. 700, 271 S.W. 1059 (1925).

[32] One state, New Hampshire, refuses to accept either the right and wrong test or the test of irresistible impulse. There the rule is that a jury question is presented in each case as to whether the alleged mental disease was such as to take away the capacity to form the requisite criminal intent. See WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 15-16 (1933).

[33] 81 Ala. 577, 60 Am. Rep. 193 (1886).

[34] Parsons v. State, 81 Ala. 577, 585, 586, 60 Am. Rep. 193, 198-199 (1886).

case law, properly connotes knowledge and will. Hence, a crime, properly understood, really involves a certain knowledge, will, and an *illegal act.* In the last analysis, then, it appears that the distinction between a moral wrong and a legalistic crime is the type of knowledge and will demanded and the type of act prohibited. Both, however, require or should require some type of knowledge and will as the basis for responsibility.

This is quite natural and fitting, since the moral system presents the perfect, utopian idea as compared with the imperfect positive law system. As has been pointed out, the moral law, concerned only with individual guilt rather than consequences of acts, lays stress on the mind of the actor in that the act must be known to be wrong. Criminal law, on the other hand, is, in the nature of things, concerned in the first instance with the objective, manifested act both because of its effect on an ordered society and as indicative of the mental state of the actor. Thus, the different functions of moral and criminal law result in a different emphasis in the two systems of law. Criminal law has variously laid primary or total stress upon either the act, the result, the intent of the actor, or, most frequently, on a combination of act and intent. This divergent stress is present in both legal theory and decisional law. For example, criminal attempt no doubt stresses the intent element[35] since punishment follows regardless of the consummation of the act, while involuntary manslaughter tends to emphasize the act and its consequences regardless of actual intent, as do all crimes which require only general intent.

This is not a condemnation of the positive criminal law system. The system no doubt suffers from inherent defects which inevitably flow from an imperfect human nature and society. The fact of inherent imperfections in the law should not, however, prevent us from at least striving for the rational ideal. The writer believes that the rational ideal represents a stress upon a combination of act and intent as essential elements of all crimes. Total reliance on the intent is erroneous because intent can only be drawn from an act; total stress on the result is manifestly wrong or all killing would be murder; and total emphasis on the act is obviously unjust, since all acts are in themselves indifferent. The only rational and just solution is an emphasis on a combination of act and intent. This, of course, presupposes a reasonable interpretation of what intent should actually signify, i.e., at least knowledge on the part of the actor that he is acting and a wilful commission of the act.

Statutory Crimes

The statements made above bring us to a short consideration of statutory crimes where the retreat from the concept of knowledge and will as the basis

[35] All that is required is specific intent and an overt act toward consummation. People v. Miller, 2 Cal. 2d 527, 42 P. 2d 308 (1935).

for criminal responsibility is particularly manifest. No doubt legislatures have limited ability to decide which acts are so detrimental to social welfare as to deserve criminal sanctions; and no doubt public welfare and an ordered society demand that every person must be deemed to know the law. However, these principles plus the idea of general intent constitute the full extent to which any reasonable law should go. With these principles set solidly in the positive criminal law, all that is required for criminal responsibility is the knowing and wilful commission of an act forbidden by the positive criminal law, regardless of whether the actor knows that the act is forbidden and regardless of the morality of the act. Certainly no reasonable law should settle for less than these few requirements.

Statutory crimes often go further than these limits. These crimes are of two sorts: statutory crimes which punish the doing of an affirmative act, where the act, at least, must be knowingly and wilfully done, or which punish the wilful omission of a required act, e.g., the sale of securities without a license, or the wilful failure to file a tax return; and statutory crimes which may reach to the unknowing and involuntary acts of a wholly innocent party, e.g., the rifling statutes. If we are correct in supposing that the rational basis of criminal liability is knowledge and will, statutory crimes which may have the latter effect are clearly unjust. While it is said that public welfare justifies any private injustice which may result, it is to be wondered whether there is any public benefit in the possibility of criminally punishing a person's unconscious and involuntary acts and whether society even has the right to subjugate individual rights to public welfare to this extent.

Somewhat the same considerations apply in the case of vicarious criminal responsibility such as the imputation of intent to a business entity through the acts of its agents. If it is unsatisfactory to speak of intent on the part of a corporation, it is positively absurd to speak of knowledge and will on the part of a corporation. No doubt the detrimental acts of corporate agents should be punished, and, perhaps, the corporation and its stockholders should be made to carry some financial burden because of these acts, but is the application of criminal law to the corporation through a wholly fictitious use of criminal intent the answer in this area? The writer thinks not. Public welfare can be adequately protected by tort laws in the area of absolute liability, by the injunctive process, by dissolution in appropriate cases, or by other specific sanctions directed at corporations which make it unprofitable and inconvenient for them to carry on the prohibited acts. There is no need or excuse for introducing another confusing accretion onto the already vague concept of intent.

It must be admitted that statutory crimes have generally been upheld, but, at times, they have met strong judicial opposition on the basis of state constitu-

tions[36] or the federal Constitution.[37] It is to be fervently hoped that the recent United States Supreme Court case, *Lambert v. People*,[38] is but the prelude to a concerted assault on statutory crimes, for this invidious trend in modern law carries with it the grave inclination to sacrifice private rights upon the high altar of statism. The author regards this trend as a clear retrogression of the criminal law to primitive principles of animal punishment and punishment based on the act itself regardless of the guilt of the actor.

Conclusion

We started this discussion with a statement from one of the great jurists America has produced. It is fitting that we close with a quotation from the same justice.

> "The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature.[39]"

This paper has tried to demonstrate that the confusion surrounding the word "intent" has led to grave errors in the criminal law and that the real basis of criminal responsibility is, or should be, a certain type of knowledge and will in all cases. Intent has become such a vague concept that semantics rather than basic principles have come to govern the criminal law. A trend once started is difficult to reverse. But if the law is to grow in accord with human nature and reason, the retrogression in criminal law toward injustice and incomprehensibility must be halted. Intent must be understood for what it is—knowledge and will—and these elements must be made basic requirements for criminal responsibility in every case, so that criminal law can be molded into a just and harmonious whole.

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[36] See State v. Park, 42 Nev. 386, 178 Pac. 389 (1919). Here a statutory crime was struck down on the theory of "intolerable inconvenience," i.e., the police power of the state was overreached since public benefit was exceeded by public inconvenience.

[37] Lambert v. People, 78 Sup. Ct. 240 (U.S. 1958).

[38] *Ibid.* Here, a California felon registration law was struck down as a violation of due process in that it punished the omission of an act, without intent, i.e., without knowledge of the law. The case has been bitterly criticized as an invalid interference in state matters, as are all decisions of the Supreme Court by those who consider themselves adversely affected. It must be admitted that the decision is in utter conflict with established principles of criminal law in that it seems to make ignorance of the law a defense in certain types of crimes. Nevertheless, the justice and good sense of the decision is obvious. Just how far it will serve as a precedent for an attack on statutory crimes is doubtful, since the Court was careful to limit the decision to statutory crimes of omission. It should be added, however, that the difference beween the unknowing omission of an act and the unknowing commission of an act is too subtle to support a distinction.

[39] Holmes, J., in Brown v. United States, 256 U.S. 335, 343 (1921).